

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7-31-1593-88
LIM BENG CHOON J
20 APRIL 1990

Land Law — Order for sale and for possession of land — Non-compliance with rule of court in regard to claim for possession — Claim for possession abandoned — Whether application to be dismissed — Rules of the High Court 1980, O 83 r 2(3)

Land Law — Order for sale — Notice of demand — Amount specified in notice allegedly in excess of amount due — Chargee not entitled to part of sum claimed in notice — Whether notice ineffectual and invalid — National Land Code 1965, s 256(3)

The plaintiff applied for an order that the defendant do show cause why the land charged by the defendant to the plaintiff to secure the repayment of a loan to a third party should not be sold by public auction under the direction of the court for the recovery of the money claimed. There were inconsistencies as regards the amount that the plaintiff said was owing to them. It was argued by the defendant, inter alia, that the plaintiff were not entitled to charge default interest since they had not given any notice pursuant to cl 5 of the charge annexure which provided that such notice shall be given before the default interest could be imposed.

Held, dismissing the plaintiff's application:

The sum demanded by the plaintiff in their notices of demand had included the element of default interest. Clause 5 of the charge annexure required a notice to be served before any default interest could be imposed and there was no evidence to show that such notice had in fact been given either to the borrower or the defendant. In failing to deny, contradict or challenge the allegation made by the defendant it must be held that the allegation was admitted. The wrongful demand for payment of the default interest to which the plaintiff were not entitled must necessarily render the notice of demand and the notice in Form 16D ineffectual and invalid.

[Bahasa Malaysia summary]

Plaintif memohon untuk suatu perintah bahawa defendan menunjukkan sebab mengapa tanah yang digadai oleh defendan kepada plaintiff bagi memastikan pembayaran kembali satu pinjaman kepada satu pihak ketiga, tidak patut dijual melalui lelong awam di bawah arahan mahkamah untuk mendapat kembali wang yang dituntut. Terdapatnya ketidak konsisten mengenai jumlah plaintiff kata adalah terhutang kepada mereka. Adalah diujah oleh defendan, antara lain, bahawa plaintiff tidak berhak mencaj faedah ingkar kerana mereka telah tidak memberi sebarang notis menurut fasal 5 lampiran gadaian yang memperuntukkan bahawa notis tersebut mestilah diberi sebelum faedah ingkar boleh dikenakan.

Diputuskan, menolak permohonan plaintiff:

Jumlah yang dituntut oleh plaintiff dalam notis-notis tuntutan telah memasukkan elemen faedah ingkar. Fasal 5 lampiran gadaian memerlukan satu notis diserahkan sebelum sebarang faedah ingkar boleh dikenakan dan tidak ada keterangan untuk menunjukkan bahawa notis tersebut telah sebenarnya diberi kepada peminjam ataupun defendan. Dalam kegagalan untuk membantah, menyangkal atau melawan pengatahan yang dibuat oleh defendan semestilah diputuskan bahawa pengatahan itu telah diakui. Tuntutan yang salah untuk pembayaran faedah

A ingkar di mana plaintiff tidak berhak tentulah akan menjadikan notis tuntutan dalam Borang 16D tidak berkesan dan tak sah.]

Cases referred to

- 1 *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 (folld)
- 2 *O'Clay v Commercial Bank of Australia Ltd* (1933) 50 CLR 200 (refd)
- 3 *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (refd)
- 4 *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 (folld)
- 5 *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 (folld)
- 6 *Bunsbury Foods Pty Ltd v National Bank of Australasia Ltd* (1983) 153 CLR 491 (folld)
- 7 *Jaffe v Premier Motors Ltd* [1960] NZLR 146 (folld)
- 8 *Clyde Properties Ltd v Tusker* [1970] NZLR 754 (folld)
- 9 *Tynte v Buller* (1854) 23 LJ Ch 504 (folld)

Legislation referred to

- National Land Code 1965 s 256(3)
Rules of the High Court 1980 O 83 r 2(3)
Property Law Act 1952 [NZ] s 92

Y Sivaloganathan for the plaintiff.
Tan Poh Meng for the defendant.

Cur Adv Vult

E **Lim Beng Choon J:** This is an application by the plaintiff bank for an order that the defendant company do show cause why the land held under Geran 30088 lot no 452 mukim of Hulu Kelang, District of Gombak (hereinafter referred to as 'the charged land') registered in the name of the defendant company and charged to the plaintiff bank should not be sold by public auction under the direction of this court for the recovery of the sum \$15,477,187.99 only being principal, interest and other dues on the said charge as at 8 January 1988. In the supporting affidavit affirmed by the assistant general manager of the plaintiff bank on 2 March 1988 it was stated, inter alia, that the charge was executed by the defendant company in favour of the plaintiff bank to secure the repayment of moneys up to the sum of \$12m only advanced as secured loan to one Dato' Seri Mohd Adib bin Mohd Adam (hereinafter referred to as 'the borrower') with interest at the rate of 15% pa on monthly rests payable on demand. As at 8 January 1988 the borrower was indebted to the plaintiff bank in the sum of \$15,477,187.99 together with interest thereon at the rate of 15% pa on monthly rests. As from 9 January 1988 a default interest at the rate of 20% pa was imposed by the plaintiff bank on the amount in excess of the approved limit till the date of realization. By letter dated 9 January 1988 the plaintiff bank through their solicitors notified the defendant company that the borrower had defaulted in repayment and demanded payment for the sum \$15,477,189.99 with interest accrued thereon but the defendant company failed to settle the

same or any part thereof within the stipulated period mentioned in the letter. Again by letter dated 19 January 1988 the plaintiff bank through their solicitors sent by AR registered post a statutory notice in Form 16D demanding the defendant company to pay the sum of \$15,477,189.99 within seven days of the service of the statutory notice failing which they would apply for a court order for the sale of the charged land. The defendant company had failed to comply with the said notice.

On 5 August 1988, the assistant general manager (Credit) of the plaintiff bank affirmed a supplementary affidavit (encl 6) in which he gave particulars of the amount outstanding as at 10 August 1988. As defence counsel was relying on certain particulars appearing therein to contend that the plaintiff bank's claim was misconceived, it is appropriate to set out those particulars that were being challenged. The said particulars are as follows:

Particulars

- (i) Amount of repayments
- (ii) Outstanding sum from disbursement of loan to 3 March 1988, viz date of issue of originating summons (inclusive of interest at the rate of 15% on monthly rests) \$15,336,809.17
- (iii) Outstanding sum from disbursement of loan to 3 March 1988, viz date of issue of originating summons (inclusive of interest at the rate of 15% pa and default interest at the rate of 20% pa on monthly rests on the amount in excess of the loan limit of \$12,000,000) \$15,931,339.07

On 9 August 1988 the director of the defendant company affirmed an affidavit (encl 7) alleging that:

- (a) the plaintiff bank's claim was misconceived as the plaintiff bank had not established the sum said to be due from the borrowers;
- (b) the claim was bad in law as the plaintiff bank charged interest upon interest at the rate of 20% pa which was contrary to s 11 of the Civil Law Act 1956;
- (c) there was no agreement to charge default interest and consequently the plaintiff bank's claim as framed in the proceeding was bad in law. Alternatively the plaintiff bank had not established their entitlement to such default interest.

Apparently to show that the outstanding accounts of the borrower had been correctly computed the assistant general manager of the plaintiff bank affirmed a second supplementary affidavit on 6 September 1988 (encl 8). Annexed to the said affidavit in encl 8 are two statements of account of the borrower as at 8 September 1988. The first statement of account (exh 'SJ2' annexed to encl 8) shows that the loan amount with normal interest and default interest was, as at 1 January 1988,

A \$15,406,369.74. The loan amount with normal interest and default interest as at 1 January 1988 was confirmed by the duly appointed receiver of the plaintiff bank by his supplementary affidavit affirmed on 28 June 1989 (see exhs 'HAK-1' and 'HAK-2' annexed to the said affidavit in encl 11). In a second supplementary affidavit affirmed on 3 January 1990 (encl 12) the said receiver averred, inter alia, that:

- (a) the amount of the advance is — \$12,000,000.00
- (b) the amount or repayment is — Nil
- (c) at the date of the issue of the originating summons the amount of interest in arrears:
 - (i) normal interest \$3,335,252.49
 - (ii) normal and default interest \$3,819,295.63

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I shall pause here for a moment to make some observations. It is clear that the figures given by the assistant general manager of the plaintiff bank in his first supplementary affidavit affirmed on 5 August 1988 (encl 6) are inconsistent with those given by the receiver of the plaintiff bank in his second supplementary affidavit affirmed on 3 January 1990 (encl 12). While the assistant general manager averred that the outstanding sum as at the date of issue of the originating summons inclusive of normal interest stood at \$15,336,809.17 and the outstanding sum as at that date inclusive of normal and default interest stood at \$15,931,339.07, the said receiver gave the two figures as \$15,335,252.49 (\$12,000,000 plus \$3,810,295.63). The said receiver thereafter filed a third supplementary affidavit affirmed on 6 February 1990. By this affidavit he admitted that there was an inconsistency in the figure given by the said assistant general manager relating to the outstanding sum as at the date of issue of the originating summons inclusive of normal interest and the figure given by him. There is a difference of \$1,556.68. He said that the difference in amount arose 'as the plaintiffs have of late been advised by their solicitors M/s Siva Thurai Mariany & Co that in the computation of moneys due on the loan disbursed payments towards legal fees and payments towards valuers on valuation fees are not to be included'.

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The said sum of \$1,556.68 had therefore been excluded by him in his computation of the loan sum as at the date of issue of the originating summons inclusive of normal interest. However no explanation had been given by him as regards to the inconsistency in the figure given by the said assistant general manager relating to the outstanding sum as at the date of issue of the originating summons inclusive of normal and default interest and that given by him for the same item. The difference in the amount (from my calculation) is \$121,043.44.

At the hearing of the plaintiff's application for an order for the sale of the charged land, counsel for the defendant company in his submission contended that

firstly, the plaintiff bank had failed to comply with the provisions of O 83 r 2 sub-r (3) of the Rules of High Court 1980 in that they had failed to indorse on the outside fold of the copy of the affidavit served on the defendant company a notice informing the latter that the plaintiff bank intended at the hearing to apply for an order directing the defendant company to deliver up to the plaintiff bank possession of the charged property. This omission according to counsel is fatal particularly when the plaintiff bank is claiming for delivery of possession of the charged lands. Secondly, counsel said that as there was no demand made to the borrower for repayment of the loan the plaintiff bank was not entitled to apply to this court for an order for the sale of the charged land. Thirdly, he argued that as the figures given by the assistant general manager of the plaintiff bank in his first supplementary affidavit affirmed on 5 August 1988 were inconsistent with those given by the receiver of the plaintiff bank (as mentioned by me earlier), the amount as demanded in the notice of demand and the statutory notice in Form 16D was inconclusive. Fourthly, he contended that the amount stated in the statutory notice in Form 16D was in excess of what was due to the plaintiff bank. Fifthly, he said that the plaintiff bank was not entitled to charge default interest since they had not given any notice pursuant to cl 5 of the charge annexure which provided that notice should be given before the default interest could be imposed.

With a certain adroitness that appears to put an end to the first contention of defence counsel, the plaintiff bank's counsel submitted that he was abandoning the prayer for possession of the property as the plaintiff bank could do so after the auction sale had been carried out. As regards the inconsistency in the figures as contended by defence counsel, the plaintiff bank's counsel submitted that there were two sets of figures, one set showing the outstanding sum inclusive of normal and default interests. At any rate the inconsistency relating to the outstanding sum with normal interest which showed a difference of the sum of \$1,556.68 had been explained by the receiver of the plaintiff bank in his third affidavit. Counsel also stressed that in law it was not essential to the validity of the letter of demand or the statutory notice in Form 16D calling up the debt that it should correctly state the amount of the debt. He cited the case of *Public Bank Bhd v Chan Siok Lie & Ors*¹ and the case of *O'Clay v Commercial Bank of Australia Ltd*² to support his argument.

In dealing with the first contention of defence counsel, namely, that the plaintiff bank had failed to comply with O 83 r 2 sub-r (3) of the Rules of High Court 1980, I am of the view that as the plaintiff bank have abandoned their prayer for vacant possession of the charged land, the failure on the part of the plaintiff bank to comply with the said rule of the High Court is immate-

rial. As to the second contention, namely, that no demand was made to the borrower but only to the defendant company as chargor I am also of the view that it does not prevent the plaintiff bank from applying for an order for the sale of the charged land simply because under cl 1 of the charge annexure the chargor would on demand pay to the plaintiff bank 'all sums of money which are now and shall from time to time or at any time hereinafter due or owing by the above mentioned 'Datuk Seri Mohd Adib Bin Mohd Adam'. This statement indicates that the plaintiff bank could demand payment from the defendant company when the borrower had defaulted in making repayment of the loan sum and interest — see *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd*.³ As to the third, fourth and fifth contentions, namely, the inconclusiveness of the outstanding amount said to be due and payable by the defendant company there is much force in these contentions and they necessitate more attentive consideration. It is therefore advisable, firstly, to scrutinize the pertinent terms of the charge annexure and, secondly, to turn to the case law for guidance.

The charge annexure provides in cl 1 that:

The Chargor will on demand pay to the bank all sums of money which are now or shall from time to time or any time hereinafter be due or owing by the abovenamed Datuk Seri Mohd Adib Bin Mohd Adam (IC No 1487837) of No 63, Jalan Damai, Off Jalan Ampang, Kuala Lumpur (hereinafter called the 'Customer') solely or jointly with any other persons firms or companies and whether as principal or surety or which the customer may be or become liable to the bank anywhere on banking account or accounts current or otherwise or in any manner whatsoever including the balance for the time being owing ...

and it continues to provide:

And if when the said account or accounts current or otherwise shall be closed either by demands as aforesaid or by the death of the chargor (or where the chargor shall be more than one person by the death of any of them) a balance shall be owing to the bank by the customer the chargor or the personal representatives of the chargor as the case may be will so long as the same or any part thereof shall remain owing pay to the bank interest thereon at the prescribed rate with monthly rests computed from the time when such balance shall have been ascertained and the chargor agrees that the statement of the manager assistant manager sub-manager accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive.

Clause 2 provides that the notice of demand shall be in writing and signed by an authorized officer of the plaintiff bank or their solicitor or firm of solicitors purporting to act for them and the mode of service of the notice of demand. Clause 5 says that 'any excess amount shall be subjected to the default charges at one and one third (1 1/3) times of the above interest rate and shall take effect from the date prescribed in the notice'. Lastly, cl 31 provides:

In the event of any breach by the Chargor of any of the agreements covenants terms stipulations and undertakings herein provided and on the part of the Chargor to be observed and performed (including the agreement or covenant to pay the sum for the time being owing to the Bank on demand as aforesaid) occurring and continuing for a period of not less than seven (7) days it shall be lawful for the Bank forthwith to give notice to the Chargor under section 254 of the National Land Code requiring the Chargor to remedy the said breach within a period of not less than seven (7) days and service of such notice demanding payment of the balance due as hereinbefore provided.

I shall now turn to the case law to seek some guidance. In *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors*,⁴ our Federal Court had to construe, inter alia, the scope of s 256(3) of the National Land Code 1965 which is as follows:

On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary. (Emphasis is mine.)

In construing the words which I have emphasized the Federal Court said at p 388 of the reported case:

It is clear that notwithstanding the proof of default by a chargor the chargee is not automatically entitled to an order to sale nor would the court without scrutiny allow his application. The court must decide whether there are circumstances in the case before it which, would amount to a cause to the contrary' within the meaning of sub's (3) which would be sufficient in its opinion to refuse the chargee's application although the charge is lawfully default is proved.

Although the judgment of the Federal Court had been reversed when the matter went on appeal to the Privy Council nonetheless the construction which the Federal Court placed on the provisions of s 256(3) had been acknowledged by the Privy Council. Thus Lord Oliver of Aylmerton, in his judgment on *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor*⁵ said at p 460:

Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied, of the existence of 'cause to the contrary'. Granting that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

The 'existence of cause to the contrary' in the present case revolves around the validity or otherwise of the notice of demand sent by the solicitors of the plaintiff bank on 9 January 1988 and the subsequent statutory notice in Form 16D sent by the same solicitors on 19 January 1988. The attacks mounted by the defendant company against the validity of the said notice of demand and the statutory notice in Form 16D are basically that (i) the sum mentioned in both the notices exceeds the actual sum owed and payable by the bor-

rower and (ii) the plaintiff bank has not established their entitlement to default interest.

In taking into consideration point (i) raised by the defendant company, the answer to their challenge can be found in *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd*.⁶ In that case Bunbury Foods Pty Ltd granted a debenture to the National Bank of Australasia Ltd to secure the repayment of money lent by the bank. By notice dated 5 April 1982 the bank demanded payment of the moneys then owing but the notice did not specify the amount owing. Three days later the bank handed to an officer of the company a letter giving details of the debt which overstated the amount owing. The company and its director thereupon contended that the notice was bad because it did not specify the amount payable and this omission was not cured by the subsequent letter which overstated the amount owing. In rejecting the contention the High Court of Australia said at p 504:

The foregoing examination supports the view that the interests of the parties will be more adequately protected by the principle that the debtor must be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realize the security than the adoption of the suggested proposition that the notice of demand must specify the amount of the debt. In determining whether the debtor has had such an opportunity it will be relevant to take account of the debtor's knowledge, lack of knowledge and means of knowledge of the amount due and of the information which the creditor has provided in that respect, including the response which he has made to any inquiry by the debtor.

The principle enunciated in that case has been applied by our court. In *Public Bank Bhd v Chan Siok Lie & Ors*¹ Shankar J in applying the said principle said at p 308:

There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a sine qua non to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice: see *Malayan Banking Bhd v Lim Ghee Leng*. Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in notice, the notice will be invalidated. The law indeed is otherwise.

I respectfully agree with the principle laid down in the two cases cited above. Applying the said principle to the present case, contention (i) of the defendant company must be rejected. In arriving at this conclusion I am not saying that in no circumstances can a chargor challenge a notice or demand. He can certainly mount a challenge if he or the borrower (in the case of a third party charge) is in a position to pay off the sum demanded and wishes to know the exact and precise sum and he had communicated with the creditor and asked the creditor what sum he was required to pay. Nothing of this sort has happened in the present case; the defendant company merely ignored the two notices of demand.

With regard to defendant company's contention (ii), namely, that the plaintiff bank is not entitled to claim for default interest, this issue stands on a different footing for if the plaintiff had in their notices of demand asked for something to which they were not entitled then the notice may well be ineffective and invalid. Turning to the authorities in this aspect of law, the first case which I would like to refer is *Jaffe v Premier Motors Ltd*.⁷ In that case the plaintiff, who was the mortgagor under a memorandum of mortgage securing the sum of £27,618 advanced by the third defendant on the terms in the mortgage set out, sought an injunction restraining sale through the registrar of the court of the property which was the security of the mortgage. The short point on which the plaintiff's action was based was the allegation that the first defendant had failed to give a valid notice under s 92 of the New Zealand Property Law Act 1952. That section, in effect, provided that no power to sell land conferred by any mortgage could become exercisable and no moneys secured by any mortgage of land could become payable by reason of any default in payment of any moneys secured or in the performance of any covenant expressed or implied in the mortgage unless and until the mortgage served on the owner of the land a notice specifying the default complained of, the date on which the power would become exercisable or the moneys would become payable and requiring the owner to remedy the default and the owner failed to remedy the default before the date so specified. It was common ground that the plaintiff was at all material times in default of the stipulated weekly payments of interest. It was also indisputable that the principal moneys secured by the mortgage were repayable only much later than the date specified in the notice but cl 5 of the mortgage contained a provision to the effect that if the mortgage made default in any matters then the principal sum would, at the option of the mortgagee, become immediately payable without notice. The point in debate was that if the mortgagor failed to remedy his defaults in the payment of the interest before the notice expired, would the principal sum become payable pursuant to cl 5 of the mortgage? The Supreme Court of New Zealand held that it was not and said at p 147:

As upon the construction and effect which I have given to s 92 of the Property Law Act and cl 5 of the mortgage, the principal moneys secured by the mortgage were not payable unless the plaintiff failed to remedy the breaches of covenant within the date fixed by the notice. It follows that the plaintiff was not required in law to pay the principal sum in order to remedy the defaults complained of. In the result, the notice given was one which not merely required the mortgagor to remedy the defaults, but required him to repay the principal as well.

Accordingly the Supreme Court of New Zealand held that the first defendant had not given a valid and effectual notice under s 92 and that the mortgagee was not entitled to exercise his power of sale because (at p 148):

A In a case such as the present, in which the very purpose of s 92 is to ensure that a mortgagor will have an opportunity of escaping the calling up of the principal sum and that he will receive a notice that will give him that opportunity, a notice which demands payments of the principal sum denies the mortgagor the very privilege the section was intended to give. Such a notice is not merely a notice which demands an excessive sum. It is a notice which defeats the very purpose for which the section requires it to be given. Such a notice cannot, in my view, be a valid and effectual notice under s 92.

B The ratio decidendi in the *Jaffe* case⁷ is lucidly explained by Richmond J in *Clyde Properties Ltd v Tusker*⁸ at p 757 where the learned judge after citing the aforementioned passage in the judgment of the *Jaffe* case⁷ went on to say:

C There is, to my mind, a very important difference between the notice with which Shortland J was concerned and the notice with which I am concerned in the present case. In the present case there is no dispute that the principal moneys had, in fact, fallen due under the mortgage. The notice describes them as being greater by £500 than they in fact were. In *Jaffe's* case the notice treated the principal moneys as having become due whereas, in fact, the effect of s 92 was to override the provisions of the mortgage document and to prevent the principal moneys becoming due by virtue of a breach of covenant during the currency of the mortgage unless and until notice in respect of such breaches of covenant was given and the breaches were not remedied before the date specified in the notice.

D From the propositions advocated in the two cases mentioned above, there is a clear distinction between an innocent erroneous sum specified in the notice of demand and a wrongful demand for payment of something to which the chargee is not entitled whether under the charge or under a statutory provision.

E Now in the present case, it may be recalled that in the two notices of demand the amount which the defendant company was required to pay as at 8 January 1988 was for the sum of \$15,477,189.99 together with interest accrued thereon. In the Form 16D the plaintiff bank elaborated the amount to be paid in this manner:

F ... and the amount outstanding in the account of the borrower as at 8 January 1988 is \$15,477,187.99 ... together with interest thereon at the rate of 15% pa on monthly rest with default interest at the rate of 20% pa on monthly rest on the amount in excess of the approved limit of \$12,000,000 from 9 January 1988 to date of full realization and is payable on demand.

G It is manifestly clear from the affidavits of the plaintiff bank that the sum demanded by them comprised not only of the capital sum and the normal or prescribed interest at 15% pa but also inclusive of the normal interest and default interest at the rate of 20% pa.

H This proposition is supported by the first supplementary affidavit affirmed by the assistant general manager of the plaintiff bank (encl 6) where he gave particulars, firstly, of the outstanding sum 'from the disburse-

ment of loan to 3 March 1988, viz the date of originating summons (inclusive of interest at the rate of 15% pa on monthly rests) as \$15,336,809.17'. On the other hand the outstanding sum 'from disbursement of loan to 3 March 1988, viz date of issue of originating summons (inclusive of interest at the rate of 15% pa and default interest at the rate of 20% pa on monthly rests on the amount in excess of the loan limit of \$12,000,000 as \$15,931,339.07' bearing in mind that the defendant company had never made any repayment towards the loan from the date of disbursement, the sum of \$15,477,187.89 demanded in the notice of demand and in Form 16D cannot be equated with the outstanding sum comprising the loan and the normal interest but rather with the outstanding sum comprising the loan and the normal interest as well as the default interest. Further support of the said proposition can be found from the second supplementary affidavit affirmed by the said assistant general manager (encl 8) where it was stated that the opening balance of the loan account with normal interest as at 1 January 1988 was \$14,945,578.98 while the opening balance of the loan account with the normal interest and default interest as at that day was \$15,406,369.74.

The figure of \$15,477,187.99 as mentioned in both the notices of demand must therefore reflect the balance of the loan account with normal and default interest. In short the sum demanded by the plaintiff company in their notices of demand must have included the element of default interest. Now cl 5 of the charge annexure required a notice to be served before any default interest could be imposed and there is no evidence to show that such notice had in fact been given either to the borrower or the defendant company, as chargor. Indeed when defence counsel in his submission suggested that there was no evidence to show that such a notice had been given, the plaintiff's counsel said that the plaintiff bank would abandon the prayer for default interest and the issue of lack of notice should go for trial. But the court could grant an order in terms of the remaining prayers in the originating summons. With due respect I cannot agree with the suggestion of the plaintiff's counsel. From the evidence before me there is clearly nothing to show that the plaintiff bank had given the requisite notice for if it were otherwise they could have easily produced the same particularly when they were fully aware that the defendant company had in their affidavit averred that 'the plaintiff has not established their entitlement to default interest'. In failing to deny, contradict or challenge the allegation made by the defendant company it must be held that the allegation is admitted — see *Tyne v Buller*.⁹ Under the circumstances I am impelled to hold that the wrongful demand for payment of the default interest to which the plaintiff bank is not entitled must necessarily render the notice of demand and the Form 16D ineffectual and invalid.

A It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff bank had no right.

In the circumstances of this case I am satisfied that the plaintiff bank are not prima facie entitled to the remedies sought by them in their originating summons. The matter must go for trial. Costs of this proceeding are to be paid by the plaintiff bank to the defendant company.

Application dismissed.

C Solicitors: *Siva, Thurai Mariany & Co; Nik Hussain & Partners.*

Reported by *PS Ranjan*

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